MEMORANDUM OF UNDERSTANDING
BETWEEN
THE INFORMATION COMMISSIONER AND THE SCOTTISH INFORMATION COMMISSIONER.

1 INTRODUCTION

1.1 The purpose of this memorandum is to clarify the relationship between the Information Commissioner (IC) and the Scottish Information Commissioner (SIC) under the Data Protection Act 1998 ('the 1998 Act'), the Freedom of Information Act 2000 ('the 2000 Act'), the Freedom of Information (Scotland) Act 2002 ('the 2002 Act'), the Environmental Information Regulations 2004 ('the 2004 Regulations') and the Environmental Information (Scotland) Regulations 2004 ('the 2004 Scottish Regulations').

1.2 Both Commissioners shall, in the performance of their functions, co-operate with and provide assistance to each other.

1.3 This Memorandum also seeks to establish a working framework for the development of this relationship in practice.

1.4 The Memorandum should not be seen as a legally binding document. It will be subject of annual review.

2 WORKING RELATIONSHIP

2.1 The Commissioners are committed to the development and maintenance of a collaborative and constructive relationship. Both Commissioners have a statutory duty to promote the rights of individuals to access publicly held information. There is significant similarity between the 2000 and 2002 Acts, both sets of 2004 Regulations and the legislative framework in which the two Commissioners operate, but there are also key differences. Each Commissioner may wish to take a particular position or interpretation in undertaking their duties and to undertake certain substantive work in this respect. The Commissioners will co-operate with each other in carrying out these duties in order to avoid duplication of effort and to make effective use of public funds.

2.2 Where, in any circumstances, a conflict of interest may arise the Commissioners will keep each other informed of their respective positions and the reasons for same. In some circumstances there may also be a conflict of opinion. To prepare for such an eventuality, the Commissioners will share general information about their approach to cases where possible and their guidance on interpretation of exemptions.

3 THE LEGAL FRAMEWORK

3.1 The IC is appointed by virtue of section 6(1) of the 1998 Act, as amended by paragraph 13(2) in Part 1 of Schedule 2 of the 2000 Act.

3.2 The SIC is appointed by virtue of section 42(1) of the 2002 Act.

3.3 Under section 63(b) of the 2002 Act the SIC may disclose to the IC any information obtained or furnished to him under or for the purposes of the 2002 Act if it appears to him that it relates to

(a) any matter in respect of which the IC could exercise any power conferred by

(i) Part V of the 1998 Act (enforcement)
(ii) section 48 of the 2000 Act (practice recommendations) or
(iii) part IV of the 2000 Act (enforcement)

or

(b) the commission of an offence under

(i) any provision of the 1998 Act other than para 12 of Schedule 9 (obstruction of execution of warrant) or
(ii) section 77 of the 2000 Act (offence of altering etc records with intent to prevent disclosure)

3.4 By virtue of section 76A of the 2000 Act, the IC may disclose to the SIC any information obtained or furnished to him if it appears to the IC that the information is of the same type that could be obtained by, or furnished to, the SIC under or for the purposes of the 2002 Act.

3.5 The IC has neither powers nor authority in respect of the 2002 Act and the 2004 Scottish Regulations and the SIC likewise in respect of the 1998 and 2000 Acts and the 2004 Regulations.

3.6 There is, however, a responsibility for the SIC, as a data controller, to notify the IC under section 18 of the 1998 Act that he wishes to be included in the register.

4 REFERAL OF INFORMATION BY EITHER COMMISSIONER TO THE OTHER.

4.1 The SIC will aim to disclose information under section 63 of the 2002 Act and the IC will aim likewise in respect of section 76A of the 2000 Act, as set out in 3.3 and 3.4 above, as a matter of course and would exercise the discretion not to use their powers only in exceptional circumstances, the basis for which decision will be discussed between them.

4.2 In disclosing such information to each other, the IC and the SIC will have cognisance of the constraints placed upon them by section 59 of the 1998 Act and section 45 of the 2002 Act respectively.

5 REFERRAL OF COMPLAINTS UNDER THE 1998, 2000 AND 2002 ACTS, THE 2004 REGULATIONS AND THE 2004 SCOTTISH REGULATIONS.

5.1 The IC has a duty under section 42 of the 1998 Act to consider a request for assessment from an individual in respect of any alleged failure by a data controller to process that person's personal data in accordance with the provisions of the Act.

5.2 The IC has a duty under section 50 of the 2000 Act to consider a complaint from an individual concerning the failure by a public authority to comply with any of the requirements in Part 1 of that Act. A similar duty exists under Regulation 18 of the 2004 Regulations concerning the failure of a public authority to comply with any of the requirements of those Regulations.

5.3 The SIC has similar duties to para 5.2 under section 47 of the 2002 Act and Regulation 17 of the 2004 Scottish Regulations.

5.4 Where an individual (or his or her representative) mistakenly contacts either Commissioner with a complaint falling within paragraphs 5.1, 5.2 or 5.3 above, that Commissioner will inform the individual of the functions and remit of the other and with the individual's consent refer the complaint as quickly as possible to the other Commissioner. If consent is withheld then the Commissioner receiving the request will pass on the contact details of the other Commissioner to the individual (or his or her representative)..

5.5 In respect of the complaints referred to in this section, neither Commissioner will represent to the individual concerned that the other Commissioner will be in a position to take up the complaint in question or commit that Commissioner to any course of action. The Commissioners will, however, establish liaison between their staff at a senior level to monitor the effectiveness of the referral process outlined above.

6 JOINT/MULTIPLE REQUESTS FOR INFORMATION

6.1 The public bodies for which the Commissioner and the Scottish Commissioner have responsibilities are laid out in the Schedules to the 2000 and 2002 Acts respectively and are, insofar as a request relates to environmental information, further defined in the 2004 Regulations and the 2004 Scottish Regulations respectively.

6.2 Notwithstanding the arrangements made under paragraph 5, both Commissioners recognise that there may be occasions where an applicant may request the same information from a public body listed in the 2002 Act and a public body listed in the 2000 Act where the latter body has a UK wide remit. The Commissioners also recognise that both Commissioners may wish to claim that an authority is covered by the set of 2004 Regulations under their jurisdiction.

6.3 Under these circumstances when it becomes apparent to either Commissioner that he is required to take a decision under section 50 of the 2000 Act, section 47 of the 2002 Act, the 2004 Regulations or the 2004 Scottish Regulations as appropriate then he will immediately bring that to the attention of the other Commissioner.

6.4 Recognising their mutual independence both Commissioners will endeavour to reach a consistent outcome. However, if agreement cannot be reached, each will liaise with the other in order to minimise any adverse public reaction to their differing stances and actions.

7 PERSONAL INFORMATION EXEMPTION

7.1 In summary, section 40 of the 2000 Act and section 38 of the 2002 Act both provide that information is exempt information if it constitutes personal data (within the meaning of section 1(1) of the 1998 Act) of which the applicant is the data subject. Section 38 of the 2002 Act extends that to include (i) personal census information and (ii) a deceased person's health record.

7.2 In considering any decision they may be required to take under section 50 of the 2000 Act or section 47 of the 2002 Act which relates to the exemption described in para 7.1 both Commissioners recognise the right of the other to interpret the provisions of the exemption provided by the relevant Act in their own way.

7.3 Both Commissioners will publish their respective interpretative guidance relevant to sections 40 of the 2000 Act and 38 of the 2002 Act. Both recognise their mutual independence. However, each will be aware of the guidance produced by the other and

in instances where any difference in interpretation is likely to bring adverse public reaction then each will advise the other accordingly and both Commissioners will endeavour to follow the ethos outlined in para 6.4.

8 LIAISON MEETINGS

8.1 The IC and the SIC shall, in the first instance, meet bi-annually.

8.2 The meetings will be an opportunity to discuss items of mutual interest and concern in relation to the interface and operation of the 1998, 2000 and 2002 Acts and the 2004 Regulations and 2004 Scottish Regulations. Each Commissioner may be accompanied by members of their respective staff as each deems appropriate.

8.3 The meetings will rotate between their respective offices and the host Commissioner will act as chair and provide the secretariat function.

8.4 The Assistant IC (Scotland) will meet with the SIC on a bi-annual basis on the same conditions outlined in para 8.2.

8.5 With mutual agreement the meetings referred to at paras 8.1 and 8.4 may be combined.

8.6 Nothing in this memorandum prevents more frequent meetings from taking place between the IC and the SIC or their respective members of staff.

8.7 In due course, the IC and the SIC may decide to hold their meeting on an annual basis or at some other appropriate interval. That arrangement however, will not affect the bi-annual meetings between the Assistant IC and the SIC.

9 ARRANGEMENTS FOR MUTUAL BENEFIT

9.1 Office facilities

9.1.1 The IC has established a Regional Office in Edinburgh, headed by an Assistant IC.

9.1.2 Facilities may be made available by the IC for the SIC and his senior staff to use his Edinburgh office on an ad hoc basis should their duties require it. This facility will be provided free of charge.

9.2 Staff development

9.2.1 In the interests of staff development, arrangements may be made for staff from the IC's office to take up short or longer term secondments in the SIC's office in order to promote a mutual understanding of the operation of the 1998, 2000 and 2002 Acts, the 2004 Regulations and 2004 Scottish Regulations.

9.2.2 Arrangements similar to those referred to at paragraph 9.2.1 above may be made for staff from the SIC's office.

9.2.3 For the avoidance of doubt, a secondee placed in either Commissioner's office will remain an employee of the 'sending' Commissioner who will be responsible for the payment of salary, subsistence and travel expenses.

9.2.4 Day to day management of the secondee will lie with the 'host' Commissioner and at the conclusion of the secondment a Performance Management report will be forwarded to the 'sending' Commissioner. The secondee will be considered to be an agent of the 'host' Commissioner for the purposes of section 59 of the 1998 Act or section 45 of the

2002 Act as appropriate. It will therefore be a criminal offence for the secondee to disclose information obtained or furnished to the 'host' Commissioner in terms of the said section 59 or said section 45.

9.2.5 Any matter involving unsatisfactory performance or discipline will be immediately brought to the attention of the 'sending' Commissioner and the appropriate action will be mutually agreed between the Commissioners.

9.3 Joint Projects

9.3.1 Both Commissioners undertake to work jointly on issues in the public interest and for their mutual benefit, such issues may include:

- The production of information explaining to the matters of the public and to specific interest groups their joint views on the operation of Freedom of Information legislation and the exemptions under the respective Acts
- The organisation of conferences and seminars on matters of mutual concern
- The undertaking of relevant research initiatives
- Liaison with other Information Commissioners

9.3.2 Each Commissioner undertakes to share with the other, on a regular basis and at an early stage of development and subject to any confidentiality requirements, information which it feels may be of interest to the other.

10 ADMINISTRATIVE ARRANGEMENTS

10.1 Following the adoption of this Memorandum, both Commissioners will co-operate in the production of a series of Protocols to agree the administrative arrangements necessary to take forward the principles of this Memorandum.

11 REVIEW

11.1 At their annual meeting, the Commissioners will review the operation of this Memorandum and any changes to this Memorandum can only be made by their mutual agreement.

11.2 Unless otherwise agreed, this Memorandum will be treated as applying to subsequent holders of the Offices of IC and SIC unless its provisions are explicitly amended or revoked by those office holders.

Signed by the Information Commissioner and the Scottish Information Commissioner in February 2005